Montana Department of
ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.state.mt.us

TO: Senator Gebhardt, Chair, Senate Natural Resources Committee

FROM: George Mathieus, Department Environmental Quality

SUBJECT: SB 200 – Commerce Clause

DATE: February 6, 2009

The question was raised as to whether or not SB 200 was unconstitutional according to the Commerce Clause.

It is the opinion of the Department and chief legal council that SB 200 does not violate the commerce clause based on the following points:

1. The bill does not discriminate against out-of-state sellers. If these manufactures' existed in Montana, they would be held to the same requirements.
2. It would allow for the ability to address legitimate local public interests (water quality).
3. It likely won't affect all Montana counties.

Please see the attached memo from DEQ council. If you have any additional questions, please contact me at 444-7423, or John North, Chief Legal Council at 444-2018.

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To: John North, Chief Legal Counsel

From: Claudia Massman, DEQ Attorney

Date: February 6, 2009

Re: S.B. 200 - Commerce Clause

You have asked for an analysis of the federal Commerce Clause as it relates to Senate Bill 200, which would prohibit the sale of household cleaning products containing phosphorous in certain areas of Montana. The following is a brief overview of how courts view state statutes imposing restrictions on access to local markets on out-of-state sellers and suppliers of commodities.

The power of the federal government to regulate interstate commerce does not prevent states from adopting reasonable measures designed to secure the health, safety and welfare of their people. *Clason v. Indiana,* 306 U.S. 439 (1939). Although courts are diligent to protect against "economic isolationism" and protectionism, they also recognize that incidental burdens on interstate commerce may be unavoidable to safeguard the health and safety of a state's citizens. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity is used. *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the courts have adopted a much more flexible approach, which is stated below:

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits....If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)

Since Senate Bill 200 does not discriminate against out-of-state sellers for the economic benefit of local sellers, the *per se* rule of invalidity does not apply. Rather, courts would use the more flexible analysis provided above in view of the local purpose, local benefits, and degree of economic burden imposed on sellers by the statutory prohibition.